NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 18-1092

(Consolidated with 18-1156, 18-1228)

DIRECTSAT USA LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement from an Order of the National Labor Relations Board in NLRB No. 13-CA-176621

FINAL REPLY BRIEF FOR PETITIONER

ERIC P. SIMON
DANIEL D. SCHUDROFF
DOUGLAS J. KLEIN
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
Tel.: (212) 545-4000
Fax: (212) 972-3213
eric.simon@jacksonlewis.com
daniel.schudroff@jacksonlewis.com
douglas.klein@jacksonlewis.com

Attorneys for Petitioner

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GLOSSARY

"ALJ Decision" means the July 20, 2017 Administrative Law Judge's Decision

"CBA" means collective bargaining agreement

"D&O" or "Decision and Order" means the Board's March 20, 2018 Decision on Review and Order

"DirectSat" or "Employer" means DirectSat USA, LLC

"DS Br. ____" means Opening Brief of DirectSat USA, LLC

"HSP agreement" means the Home Service Provider agreement between DirectSat and DirecTV pursuant to which DirectSat installs and services satellite DirecTV television equipment.

"NLRA" or "Act" means the National Labor Relations Act

"NLRB" or "the Board" means the National Labor Relations Board

"NLRB Br. ____" means Brief for The National Labor Relations Board

"Union" means International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (IBEW)

SUMMARY OF ARGUMENT

The Board ordered DirectSat to furnish the entire, unredacted HSP agreement without a finding of relevance simply because DirectSat referenced a portion of the agreement in its New Product Lines proposal. The Board's conclusion that DirectSat incorporated the entire HSP agreement by reference ignored the context of the proposal and was an irrational construction of it. The conclusion was also contrary to the Union's ultimate reason for requesting a copy of the HSP agreement. As such, the Board's conclusion was arbitrary and capricious and constituted reversible error. The Board engaged in an *ex post facto* interpretation of DirectSat's New Product Lines proposal—that DirectSat's proposal incorporated the entire HSP agreement into the CBA, and in doing so rendered the entire HSP agreement relevant. The Board did not offer any applicable case law to support its interpretation, and its interpretation is at odds with any reasonable reading of the New Product Lines proposal.

The Board's opposition misstates the finding in the Decision and Order that the Board found relevance of the entire HSP Agreement. It did not. The Board also contends the Union offered DirectSat objective evidence of its belief the entire HSP agreement was relevant to bargaining by requesting it multiple times while referencing the New Product Lines proposal. This conclusion, too, is unsupported by any case law, and ignores the Union's shifting reasons for requesting the HSP

agreement. The Union's requests and explanations of relevance over time for the HSP agreement were anything but objective and precise.

Yet, by May 2016, the Union had abandoned its claim that it needed the full HSP agreement to evaluate the New Product Line proposal. The Union's last request for the HSP agreement on May 19, 2016, was predicated solely on the Union's baseless belief of a joint employer relationship between DirectSat and DirecTV, and unrelated to any contract proposal. The day after that request, the Union filed the underlying unfair labor practice charge. In its position statement to the Board, the Union stated it wanted the HSP agreement to understand DirectSat's technician pay practices and to evaluate the purported control DirecTV had over DirectSat. The Union never mentioned the New Product Lines proposal in its position statement.

Finally, the Board's conclusion there was no due process violation ignores the irrefutable fact that the Decision and Order approved of the ALJ's misapplication of law with respect to the ALJ's right to verify analysis. Accordingly, the Petition for Review should be granted and the Board's Application for Cross-Enforcement should be denied.

ARGUMENT

I. THE BOARD'S CONCLUSION THAT DIRECTSAT'S NEW PRODUCT LINE PROPOSAL INCORPORATED THE ENTIRE HSP AGREEMENT BY REFERENCE IGNORES THE CONTEXT OF THE PROPOSAL, IS UNSUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD, AND IS ARBITRATRY AND CAPRICIOUS[1]

The Board's entire argument hinges on the erroneous and irrational conclusion that DirectSat's reference to the HSP agreement in its New Product Lines proposal rendered the full HSP agreement relevant. The Board offers no legal support for its conclusion that DirectSat proposed to "shoehorn" (NLRB Br. 22) the

[1] The Board did not oppose that portion of DirectSat's Petition challenging the Board's error in adopting the ALJ's conclusion that the Union was entitled to the full HSP agreement to verify DirectSat's claim that it provided all relevant information regarding the scope of work performed by DirectSat for DirecTV (DS Br. 31-39; NLRB Br. 25). The Board therefore concedes the ALJ misapplied Board precedent and improperly engaged in circular reasoning to find a violation of the Act on that theory. Although the Board contends it did not pass on the ALJ's right to verify argument, (NLRB Br. 25), the Decision and Order certainly did not disavow it. Nowhere in the Decision and Order did the Board expressly reject the ALJ's theory. (DS Br. 31). In fact, in its opposition brief, the Board did not even (nor could it) cite to any part of the Decision and Order to support its claim it did not pass on the ALJ's theory. It had to cite to a different decision—the Board's Order denying DirecTV's motion to intervene, to reopen the record, and for reconsideration of the Board's Decision and Order. (See NLRB Br. 25) (citing ODM 1 and noting that the Board's Order "affirm[ed] the judge's decision, although on different grounds"). Clearly, the Board accepted the ALJ's "right to verify" logic insofar as the Board did not find a due process violation. (JA 258) ("As to the third factor, it is well settled that unions have a legal right to assess and verify for themselves the accuracy of the employer's claims in bargaining.")(citing NLRB v. Truitt Mfg. Co., 351 NLRB 1159, 1160 (2006)); see also, infra Point II. The Board's professed disposal of the ALJ's right to verify logic in finding a violation of the Act is not as clear as the Board would have it.

entire HSP agreement into its CBA with the Union.[2] The Board's interpretation (NLRB Br. 21) is also contrary to any reasonable reading of New Product Lines proposal. DirectSat proposed:

> In the event the Employer is engaged *with respect to product or services* other than those pursuant to its Home Service Provider agreement with DirecTV such work shall not be deemed unit work. (JA 57, 83) (emphasis added).

Clearly, the proposal did not purport to encompass the entirety of the HSP agreement. In the context of a specific contract proposal, DirectSat proposed to define "unit work" as those tasks it performed on behalf of DirecTV. Those tasks were defined in the Exhibit 1.a.i. (JA 90) of the HSP agreement, which DirectSat furnished to the Union upon request, without objections or redactions.[3] It is not true

[2] The Board's reliance on United States v. Hunt, 843 F.3d 1022, (D.C. Cir. 2016) (quoting Restatement (Second) of Contracts § 202(2) (1981)) is misplaced. (NLRB Br. 18, n. 11). It is not a labor law case. Collective bargaining agreements are not ordinary contracts, and ordinary contract principles do not apply. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550-51 (1964) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960) (footnotes omitted). Adopting the Board's contract interpretation (or "context") reasoning (NLRB Br. 18-19), the Union would be granted unfettered access to information that is not presumptively relevant without first establishing relevance simply because such information is in a document which also contains presumptively relevant information. The Board's theory effectively eliminates the need for a union to establish the relevancy of requested information before an employer is required to produce irrelevant information. (See generally DS Br. at 38-39).

[3] Specifically, on page 1 of the HSP agreement, in a section entitled "Appointment of Contractor" the HSP agreement references the "'Services' or 'Fulfillment Services'" DirectSat provided to DirecTV, and such services are defined in Exhibit 1.a.i. (JA 89-90).

that the proposal refers to the HSP agreement as a whole. (JA 258-259; NLRB Br. 22). It is also not reasonable to conclude the Union would have exchanged its own New Product Lines proposal (JA 95) expressly referencing the HSP agreement as DirectSat had in its original proposal (JA 83) without seeing it if the Union believed DirectSat was attempting to incorporate the entire HSP agreement into the CBA. (DS Br. 24). While the New Product Lines proposal did not expressly reference Exhibit 1.a.i., it was manifest from the context of the proposal it did not purport to incorporate the entire HSP agreement. Although the Board suggests DirectSat could have modified its New Product Lines proposal to enumerate a specific section of the HSP agreement describing the products and services provided by DirectSat to DirecTV (NLRB Br. 21), DirectSat did not do so because the original proposal, when read rationally and in context, already did so.

A. The Board's Objective Evidence Theory Is Belied by the Facts

While the threshold to establish relevance may be low, it is not nonexistent. An explanation of the relevance of information that is not presumptively relevant "must be made with some precision, and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." Disneyland Park, 350 NLRB 1256, 1258 n.5 (2007) (citations omitted). (See generally DS Br. 23-24). The Board concedes the Union never explained *why* it needed those portions of the HSP agreement which had nothing to do with the scope of work performed to

evaluate the New Product Lines proposal after DirectSat provided Exhibit 1.a.i. (JA 90) defining the scope of work performed by DirectSat. Instead, the Board relies solely on its conclusory statement that the Union required the entire HSP agreement because it was referenced in DirectSat's New Product Lines proposal. (NLRB Br. 19) ("Indeed, the record demonstrates unambiguously that the Union informed DirectSat on three separate occasions that it needed a copy of the fully HSP because it was mentioned in DirectSat's New Product Lines proposal.").

The Board argues (again without offering any case law in support) that the Union's repeated request for the full HSP agreement because it was referenced in the New Product Lines proposal, alone, demonstrates that the full HSP agreement was presumptively relevant. Id. But the Board refuses to acknowledge the fact that DirectSat provided the only provision of the HSP agreement defining the scope of work and thus the only relevant provision in the HSP agreement. The Board fails to explain why the Union was entitled to the unredacted HSP agreement notwithstanding that DirectSat provided the Union with the provision of the HSP agreement defining the work performed by DirectSat for DirecTV. There is simply nothing in the record suggesting that there is any other provision of the HSP agreement remotely relevant to the work performed by DirectSat or the DirectSat's New Product Line proposal. Absent such evidence, the Board's conclusion cannot be enforced.

Further, the Board's reliance on the Union's repeated reference to the New Product Lines proposal is fatally undermined by the ever changing reasons the Union proffered for its request for the HSP agreement, including the Union's ultimate reason. It is undisputed the Union's rationale for its HSP agreement request changed over time. (DS Br. 29-30) (citing JA 84-85, 92, 94, 103). The Board's opposition cherry-picks the Union's requests of November 23, 2015, March 18, 2016, and April 5, 2016, which referenced the New Product Lines proposal.[4] However, the Board's explanation of the Union's purported objective basis for requesting the entire HSP agreement ignores the inconvenient fact (for the Board) that by May 19, 2016, the Union had abandoned its claim that it needed the full HSP agreement to evaluate the New Product Line proposal. On May 19, 2016, the Union again (and for the last time prior to filing the underlying unfair labor practice charge) requested the full

[4] Those three requests were:

1. November 23, 2015: "[O]ne of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." (JA 84-85);

2. March 18, 2016: "The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference [i]n the New Product Lines proposal." (JA 94); and

3. April 5, 2016: "The union requests a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference [i]n the New Product Lines proposal." (JA 96).

HSP agreement, but this time the only specified reason was "to evaluate the extent of control of DirectSat by DirecTV/AT&T." (JA 103). The substantial evidence in the record amply demonstrates that as of May 19, 2016, the *only* rationale for the Union's request for the full HSP was not predicated on the New Product Lines proposal, but had shifted to an unsubstantiated belief of a joint employer relationship between DirecTV and DirectSat. Tellingly, in its June 14, 2016 position statement to the NLRB, the Union explained that it wanted the HSP agreement for the following reasons:

> 1 To obtain knowledge of the method by which the bargaining unit employees and contract technicians are paid
> 2 To determine the extent of control by DirecTV (AT&T) over the hours, wages and working conditions of the bargaining unit technicians and contract technicians
> 3 And, thereby, to determine whether DirecTV (AT&T) is a joint employer for the purpose of collective bargaining
> 4 And to determine whether the contract technicians are actually functioning as employees of DirectSat and DirecTV and therefore should be accreted to the Union's bargaining unit
> 5 And possibly to determine whether the DirectSat employees and the AT&T technicians have been sufficiently integrated by AT&T that they should be accreted to the existing Local 21-AT&T bargaining unit[.]

(JA 10-12). The Union *never* referenced the New Product Lines Proposal in its position statement. The General Counsel's theory of the case before the ALJ reflected the Union's position—that it was entitled to the full, unredacted HSP

agreement to evaluate DirecTV's control over DirectSat. (JA 263; DS Br. 40-41). Of course, the ALJ rejected this theory of a violation. (JA 263). The Board's *ex post facto* interpretation of the New Product Lines proposal must be rejected on this record.[5]

B. There is No Evidence in the Record that Any of the Provisions of the HSP Agreement Other Than Those DirectSat Furnished in Unredacted Form Were Relevant to DirectSat's New Product Lines Proposal

The Board's cursory opinion failed to identify what in the HSP agreement not furnished to the Union was relevant to terms and conditions of employment of bargaining unit employees. Contrary to the Board's opposition (NLRB Br. 16-22), the Board did not find that the entirety of the HSP was relevant to negotiations, which was reversible error. (DS Br. 22-31). While unclear in many respects (see, e.g., supra, n. 1), the Decision and Order actually acknowledged the opposite—that portions of the HSP agreement were irrelevant to bargaining. The Decision and Order stated: "[a] union cannot be reasonably expected to integrate another agreement between the employer and a third party into its own collective-bargaining

[5] So, too, must the Board's analogous conclusion (NLRB Br. 22-24) that the HSP must be produced in unredacted form. For the reasons set forth in DirectSat's opening brief (DS Br. 22-31) and above, DirectSat was not obligated to furnish a full, unredacted copy of the HSP agreement because the Union's request was not presumptively relevant on its face. Further, the Union failed to otherwise establish that the redacted portions of the HSP agreement DirectSat did produce were relevant to the scope of work issue, or, for that matter, any other subject of bargaining. Id.

agreement without having a complete understanding of the contents of the incorporated document and the context *of the relevant portions within the document as a whole*." (JA 259) (emphasis added). Clearly, the Decision and Order recognized not all of the portions of the HSP agreement were relevant.

II. THE BOARD IMPROPERLY LET STAND THE ALJ'S VIOLATION OF DIRECTSAT'S DUE PROCESS RIGHTS.

The Board erred in finding no violation of DirectSat's due process rights. (DS Br. 39-42). DirectSat's argument is not that the Board in its Decision and Order denied DirectSat due process. (NLRB Br. 26). DirectSat's argument is the ALJ denied DirectSat due process, and the Board let that due process violation stand in its Decision and Order.

The Board argues DirectSat's due process claim is based on the assumption the Board adopted the ALJ's finding that DirectSat was required to furnish the full HSP agreement to the Union to verify DirectSat's claim it had furnished all relevant portions of the HSP. (NLRB Br. 25). The Board then erroneously concludes it did not adopt that theory of violation. Therefore, according to the Board, there was no due process violation. Yet, it is clear in the Decision and Order, to conclude DirectSat was not denied due process, the Board effectively adopted the rationale of the ALJ and concluded the Union had the right to the full HSP in order to verify DirectSat's assertion it had provided all relevant provisions. (JA 258). The Decision and Order stated:

> When analyzing whether a judge's finding of a violation on a theory that was not clearly articulated by the General Counsel violates a respondent's due process rights, the Board considers (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; **(3) whether the law is well established**; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory upon which the judge relied in finding the violation. [citing Paramount Industries, Inc., 365 NLRB No. 30 at 4 n. 17 (2017). (JA 258) (emphasis added).]

Then the Board explained:

> We agree, for the reasons stated by the judge, that the first two factors were satisfied in this case. Furthermore, although the judge omitted the other two factors from his analysis, on this record we are satisfied that both are met as well. **As to the third factor, it is well settled that unions have a legal right to assess and verify for themselves the accuracy of the employer's claims in bargaining.** [(JA 258) (emphasis added).]

Clearly, the Board agreed with the ALJ that it is "settled law" that "union's have a legal right to assess and verify for themselves the accuracy of the employer's claims in bargaining." (D&O 258, 264). The problem with this analysis is that the only claim present in the instant case, which the ALJ concluded the Union was entitled to verify, was that DirectSat had turned over all relevant provisions of the HSP agreement. This theory, articulated *sua sponte* by the ALJ and apparently cited approvingly by the Board, was never articulated by the General Counsel in litigating

this case. (DS Br. 40-41). Moreover, the logic of this analysis as applied to an employer's assertion that certain information is irrelevant, results in the illogical and irrational conclusion that a union is entitled to see anything an employer claims is irrelevant to verify the claim of irrelevance. (DS Br. 38-39). Thus, the Board erred to the extent it approved of the ALJ's misapplication of law to conclude DirectSat was not denied due process. (DS Br. 39-42).

* * *

CONCLUSION

The Board's Decision and Order directing DirectSat to produce a full, unredacted copy of the HSP agreement is unsupported by any evidence in the record or applicable legal precedent. For all the reasons above and in DirectSat's moving brief, DirectSat respectfully requests this Court to grant its Petition for Review and deny the Board's Cross-Application for Enforcement.

Respectfully submitted,

JACKSON LEWIS P.C.

By: /s/ *Eric P. Simon*

Eric P. Simon
Daniel D. Schudroff
Douglas J. Klein
Jackson Lewis P.C.
66 Third Avenue, 29th Floor
New York, New York 10017
Eric.Simon@jacksonlewis.com
Daniel.Schudroff@jacksonlewis.com
Douglas.Klein@jacksonlewis.com

Dated: February 1, 2019

Counsel for DirectSat USA LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that DirectSat's brief contains 3,571 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

Respectfully submitted,

JACKSON LEWIS P.C.

By: */s/ Eric P. Simon*

Eric P. Simon
Daniel D. Schudroff
Douglas J. Klein
Jackson Lewis P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
Eric.Simon@jacksonlewis.com
Daniel.Schudroff@jacksonlewis.com
Douglas.Klein@jacksonlewis.com

Dated: February 1, 2019

Counsel for DirectSat USA LLC

ADDENDUM

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Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 8. [29 § 158.]

(a) It shall be an unfair labor practice for an employer--

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 10. [29 U.S.C. § 160.]

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .

. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and

proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or

wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

CERTIFICATE OF FILING AND SERVICE

I, Simone Cintron, hereby certify that, on February 1, 2019 the foregoing Final Reply Brief for Petitioner was filed through the NextGen system and served electronically on parties in the case.

/s/ Simone Cintron
Simone Cintron